90-1491

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNION BANK,

Petitioner,

v.

HERBERT WOLAS, Chapter 7 Trustee for the Estate of ZZZZ BEST CO., INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN ALBERT GRAHAM
Counsel of Record
LESLEY ANNE FLEETWOOD HAWES
FRANDZEL & SHARE
A Law Corporation
6500 Wilshire Boulevard
Seventeenth Floor
Los Angeles, California 90048-4920
(213) 852-1000

STEPHEN H. WEISS
Senior Vice President and
Deputy General Counsel
Office of the General Counsel
UNION BANK
445 South Figueroa Street
Los Angeles, California 90071-1602
(213) 236-5906

Attorneys for Petitioner, Union Bank

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Bankruptcy Code § 547(c)(2) protects otherwise preferential payments from recovery by a trustee in bankruptcy if the payments are (a) made on a debt incurred in the ordinary course of business of the debtor and the creditor, (b) made in the ordinary course of business, and (c) made in accordance with ordinary business terms. Did the Ninth Circuit err in devising an unwritten limitation to the protection granted creditors under Bankruptcy Code § 547(c)(2); or, did the Sixth, Seventh and Tenth Circuits correctly apply Bankruptcy Code § 547(c)(2) in accordance with its plain meaning because literal application of the statute is not demonstrably at odds with the intention of Congress?

If the Court concludes that § 547(c)(2) draws a distinction between payments on short-term debt, which are protected, and payments received on long-term debt, which are not, then the following additional question is presented for determination:

2. Did the Ninth Circuit err by failing to define "long-term" debt in accordance with generally accepted accounting principles, income tax rules, and the general course of dealing in business transactions, thereby denying commercial lenders the protection of Bankruptcy Code § 547(c)(2)?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Union Bank, and the Respondent, Herbert Wolas in his capacity as Chapter 7 Trustee of the bankruptcy estate of ZZZZ Best Co., Inc.

Union Bank is a corporation organized under the laws of the state of California to conduct business as a banking institution. Union Bank's parent corporation is The Bank of Tokyo, Ltd. Union Bank has no subsidiaries, other than wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Union Bank, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on December 28, 1990.

OPINIONS BELOW

The December 28, 1990 opinion of the Court of Appeals for the Ninth Circuit reverses the judgments of the district and bankruptcy courts. The opinion is reported at 921 F.2d 968 and reprinted as Appendix A to this Petition, at 1a.

On August 8, 1989, the District Court for the Central District of California entered its Order Affirming Judgment, affirming the summary judgment of the bankruptcy court granted in favor of the Petitioner, Union Bank. The district court order was appealed by the Respondent to the court of appeals. The district court order was not published and is reprinted as Appendix B to this Petition, at 3a.

The order of the Bankruptcy Court for the Central District of California granting summary judgment in favor of the Petitioner, from which appeal was taken by the Respondent to the district court, was not published. The bankruptcy court's Judgment on First Cause of Action; Adjudication of Controversies on Fourth Claim for Relief, entered August 23, 1988, and Findings of Fact and Conclusions of Law related thereto, are reprinted in Appendices C and D to this Petition, respectively, at 6a and 10a, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 28, 1990, reversing the judgments in favor of the Petitioner entered by the district court and the bankruptcy court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves a lawsuit filed by Respondent, a Bankruptcy Trustee, to recover from Union Bank certain monthly interest payments and a small monthly loan fee as preferential transfers under § 547(b) of the Bankruptcy Code, Title 11 of the United States Code. Section 547(b) provides:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made—
>
> (A) on or within 90 days before the date of the filing of the petition; or
>
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would have received if—
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

There are exceptions to the trustee's ability to avoid certain transfers under 11 U.S.C. § 547 that are set forth in § 547(c). The exception upon which the Petitioner has relied to defend against the Trustee's preference action is § 547(c)(2), which provides as follows:

> The trustee may not avoid under this section a transfer—
>
> ....
>
> (2) to the extent that such transfer was—
>
> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms.

STATEMENT OF THE CASE

This case involves a fact pattern that occurs routinely in almost every one of the hundreds of thousands of bankruptcy cases filed each year throughout the United States: a creditor has received ordinary monthly payments on its obligation within the applicable preference period prior to the bankruptcy filing. These payments are subject to recovery by the trustee or debtor-in-possession as avoidable, preferential transfers.[1] At issue is the proper interpretation and application of a statutory exception to the trustee's preference avoiding powers for "ordinary course of business" payments on which *the courts of appeals of four circuits are divided.* The resolution of the dispute among the circuits will have profound ramifications for financial institutions which are the constant targets of preference claims and which will be left unprotected by the "ordinary course of business" exception in bankruptcies filed in jurisdictions governed by the Ninth Circuit if the court's ruling in this case is allowed to stand.[2]

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[1] According to statistics compiled by the Administrative Office of the United States Courts, there were 782,960 bankruptcy petitions filed in 1990, and 57,231 adversary proceedings were initiated. Since the preference law is one of a bankruptcy estate's primary avoiding powers, it is fair to assume that a large number of those adversary proceedings were preference actions. *Twenty-two percent* (170,102) of the nation's bankruptcy cases filed in 1990 were filed in the Ninth Circuit, illustrating the profound effect of the Ninth Circuit's ruling in this case.

[2] The Ninth Circuit's decision in this case relies on and adopts its prior decision in *Matter of CHG Int'l, Inc. (CHG Int'l, Inc. v. Barclays Bank)*, 897 F.2d 1479 (9th Cir. 1990), which decision was rendered after Union Bank had prevailed in the bankruptcy and

To avoid a transfer of property as a preference the Bankruptcy Code requires the trustee to demonstrate that the transfer was made on account of an antecedent debt and permitted the creditor to receive more than it would have received in a Chapter 7 liquidation. 11 U.S.C. § 547(b). However, even if the trustee establishes each of the elements of a preferential transfer under § 547(b), the Bankruptcy Code exempts certain preferential transfers from recovery by the estate.

The preference recovery exception at issue in this case is the provision that exempts "ordinary course of business" payments from avoidance. The creditor must demonstrate that (a) the debt was incurred in the ordinary course of the debtor's and the creditor's business or financial affairs, (b) the payment was made in the ordinary course of business or financial affairs of the debtor and the creditor, and (c) the payment was made in accordance with ordinary business terms.

The loan in this case was a $7 million unsecured revolving line of credit with an eight-month term. The Petitioner Bank received regular monthly interest payments, drawn from the debtor's checking account under an automatic debit agreement, and small monthly loan commitment fees that were calculated based upon the portion of the unused credit available under the line.

Whether the two monthly payments received by Union Bank which the Respondent Trustee sought to avoid met

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district courts and the matter had already been fully briefed in the court of appeals. When the *CHG Int'l* opinion was issued, the Trustee asserted that *CHG Int'l* controlled the disposition of this case because the loan in question was a long-term loan that as a matter of law under *CHG Int'l* was not entitled to the protections of § 547(c)(2). Union Bank preserved its rights by disputing both the applicability of *CHG Int'l* and the court's interpretation of the "ordinary course of business" exception. Union Bank requested an *en banc* hearing and specifically objected to the court's ruling that long-term debt is not within the scope of § 547(c)(2) notwithstanding the absence of statutory language or legislative history to support that proposition.

the "ordinary course of business" exception of § 547 (c) (2) was brought to the bankruptcy court for determination through cross-motions for summary judgment. The Bank presented unrefuted evidence that the loan to the debtor was made strictly in accordance with the Bank's ordinary procedures and guidelines for such extensions of credit and that, based upon the financial statements, projections and other information submitted to the Bank, the line of credit was within the amount of credit that would be expected to be extended to a company of the size and profitability set forth in the financial data. The Bank also presented unrefuted evidence that the method of payment through the automatic debiting of the debtor's checking account maintained at the Bank was an ordinary and customary method of payment that many commercial customers of the Bank use for convenience, and the monthly interest payments and loan commitment fees were ordinary types of payments routinely required in commercial loans.

The bankruptcy court ruled that the two monthly payments received by the Bank within 90 days of the bankruptcy were ordinary course of business payments under each prong of § 547(c) (2) and therefore the payments could not be avoided. Following entry of the bankruptcy court's judgment, the Respondent Trustee perfected an appeal to the United States District Court for the Central District of California.[3] The district court affirmed. The Respondent Trustee appealed the district court's ruling to the Court of Appeals for the Ninth Circuit.[4] A three-judge panel of the Ninth Circuit

[3] The jurisdiction of the district court to consider the appeal is provided by 28 U.S.C. § 158(a) which grants the district court jurisdiction to hear appeals from final judgments of the bankruptcy courts.

[4] The Ninth Circuit's jurisdiction to hear the appeal is provided by 28 U.S.C. § 158(d) which grants the circuit courts of appeals jurisdiction to hear appeals from final decisions of the district courts entered pursuant to 28 U.S.C. § 158(a) and (b).

reversed in a per curiam opinion, relying on the decision of another panel of the court in *Matter of CHG Int'l, Inc. (CHG Int'l, Inc. v. Barclays Bank)*, 897 F.2d 1479 (9th Cir. 1990).

In *CHG Int'l*, the court held that payments made on *long-term debt do not qualify* for the protections of the "ordinary course of business" exception of § 547(c) (2) *as a matter of law.* The court in the *ZZZZ Best* decision held that the eight-month revolving line of credit constitutes "long-term" debt for the purposes of § 547 (c) (2) because one of the two debts in the *CHG Int'l* case had a term of seven months and was held to be long-term debt.

The holding in *ZZZZ Best* directly conflicts with the published opinions of three other circuits on the issue of whether payments on "long-term" debt are excluded as a matter of law from the protections of § 547(c) (2). In *In re Finn (Gosch v. Burns)*, 909 F.2d 903 (6th Cir. 1990), the Court of Appeals for the Sixth Circuit reversed a summary judgment granted in favor of the trustee which had permitted recovery of ordinary course payments on a long-term debt as preferential transfers despite the "ordinary course of business" exception. The Sixth Circuit held that nothing in the statute or the scant legislative history surrounding the present version of the statutory exception provided a basis for deviating from the plain meaning of the statute and excluding long-term debt from the coverage of § 547(c) (2) as a matter of law. The Sixth Circuit reasoned that the analysis of some courts and commentators that the statute applies only to short-term trade debt "imports too much *assumed history* into the barren language of the statute." (Emphasis added.) *Finn*, 909 F.2d at 907. Instead, the court in *Finn* found that "[b]y eliminating the 45-day limitation, *and neither stating nor implying any other limitation*, Congress's language left the field open to long-term consumer debt for exception under § 547(c) (2)." (Emphasis added.) *Finn*, 909 F.2d at 908.

The Ninth Circuit did not define what constitutes "long-term" debt. No analysis of the appropriate standard for determining what is long-term debt was made by the Ninth Circuit in either *CHG Int'l* or *ZZZZ Best*.[5] The court did not address the authorities cited by Union Bank that for accounting purposes and in business generally, "long-term" debt is considered to be debt with a term longer than one year. *See* S. Stern, *Structuring Commercial Loan Agreements* ¶ 6.03[1][b] (2d ed. 1990) (WG&L); RESTATEMENT AND REVISION OF ACCOUNTING RESEARCH BULLETINS, Accounting Research Bulletin No. 43, ch. 3 "Working Capital," § A7 (Am. Inst. of Certified Pub. Accountants 1953) (hereinafter "ARB 43").

The Court of Appeals for the Seventh Circuit has relied upon the availability of § 547(c)(2) to protect lenders from the recovery of ordinary loan payments made up to one year prior to the bankruptcy in ruling that a creditor holding the guaranty of an insider can be subjected to preference exposure for a full year preceding the commencement of the bankruptcy case. *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186 (7th Cir. 1989), *aff'g in part and rev'g in part In re Deprizio Constr. Co.*, 86 Bankr. 545 (N.D. Ill. 1988) (hereinafter "*Deprizio*"). The Court of Appeals for the Tenth Circuit, relying on legislative history that the Ninth Circuit did not address or acknowledge in either the *ZZZZ Best* or *CHG Int'l* decisions, has ruled that § 547(c)(2) protects payments made on savings certificates with terms of up to one year and that § 547(c)(2) is applicable to credit other than trade debt. *Fidelity Sav. & Inv. Co. v. New Hope Baptist*, 880 F.2d 1172 (10th Cir. 1989).[6]

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[5] The vice of ignoring the statute's plain meaning is made obvious since creditors are left to guess at what constitutes "long-term" debt.

[6] There may also be a conflict with the Eighth Circuit based on its decision in *In re Iowa Premium Serv. Co., Inc. (Iowa Premium Serv. Co., Inc. v. First Nat'l Bank in St. Louis, etc.)*, 695 F.2d 1109 (8th Cir. 1982).

The court's ruling in *ZZZZ best* is also in conflict with this Court's decision in *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989), in which this Court held that the plain meaning of Bankruptcy Code provisions, as with other statutes, should be "conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.'" *Ron Pair*, 109 S. Ct. at 1031.

REASONS FOR GRANTING THE WRIT

In holding that the regular monthly interest payments on the eight-month commercial loan in this case are not protected as a matter of law under the "ordinary course of business" exception, the Ninth Circuit has rendered a decision that not only conflicts with the plain meaning of the statute and the rules of statutory interpretation established in this Court's decision in *Ron Pair* but also creates a direct conflict with decisions in the Sixth, Seventh and Tenth Circuits on the proper interpretation and application of § 547(c)(2) of the Bankruptcy Code. This conflict must be resolved as expeditiously as possible as the issue is one involving a national bankruptcy law that is intended to be uniformly applied to avoid forum shopping and the fortuity of the jurisdiction determining the result in a particular case. The Ninth Circuit's decisions in this case and the case on which it relied to reach its result, *CHG Int'l*, hold that payments on so-called "long-term" debt are not protected by § 547(c)(2); yet, the court failed to establish a definition of long-term debt, implicitly rejecting the traditional definition of long-term debt under generally accepted accounting principles which would signify a debt with a term of over one year. The lack of any standard in the Ninth Circuit for determining what constitutes a "long-term" debt excluded from protection under the Ninth Circuit's ruling leaves regulated financial institutions in a precarious position with no means of determining their po-

tential exposure to preference liability on existing loans and no way to guide their future conduct in establishing the terms of loans. This issue, which presents itself in almost every single bankruptcy proceeding, should not be the subject of conflicts among four circuit courts of appeals.

I. LACK OF UNIFORMITY IN THE CIRCUITS ON A FUNDAMENTAL ISSUE OF FEDERAL BANKRUPTCY LAW CREATES UNCERTAINTY AND RISKS FOR LENDERS THAT WILL BROADLY AND ADVERSELY IMPACT CREDIT TRANSACTIONS.

One of the primary purposes of the Court's certiorari jurisdiction is to ensure uniformity of decisions among the courts of appeals, particularly on an issue of federal law. *See, e.g., Arco Corp. v. Aero Lodge 735*, 390 U.S. 557, 559, 88 S. Ct. 1235, 20 L. Ed. 2d 126 (1968); *Northeastern Nat'l Bank v. U.S.*, 387 U.S. 213, 217, 87 S. Ct. 1573, 18 L. Ed. 2d 726 (1967); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163, 43 S. Ct. 5311, 67 L. Ed. 922 (1922). The issue presented in this case not only involves a square conflict among four circuits; the case also involves an important issue *fundamental* to bankruptcy that arises in virtually every bankruptcy case since typically debtors have made at least some ordinary course payments prior to their petition. *New York v. Saper*, 336 U.S. 328, 329, 69 S. Ct. 554, 93 L. Ed. 710 (1948) (conflict related to a matter "of considerable practical importance in the administration of the Bankruptcy Act" and certiorari was therefore granted). Further, the issue is one that will continue to present itself in the future in the hundreds of thousands of bankruptcy cases that are filed each year. The conflict is one that will not disappear, as the Ninth Circuit in *ZZZZ Best* was given a clear opportunity to alter its ruling to conform to the opinions of the Sixth, Seventh, and Tenth Circuits and chose not to do so.

The decision for which review is sought will have enormous ramifications for lenders throughout the country. The decision encourages forum shopping by large corporate borrowers who may have a choice of jurisdictions in which to file their bankruptcy cases under 28 U.S.C. § 1408 and may therefore elect to file in the Ninth Circuit to recover ordinary course payments that could not be recovered under § 547(c)(2) if the case were filed in the Sixth, Seventh, and Tenth Circuits.

As interstate and multi-state lending transactions become more commonplace, it is essential that lenders be able to rely on the uniform treatment of their obligations under federal bankruptcy preference law. Lenders need to be able to predict with reasonable certainty the effect of the federal bankruptcy laws on their transaction. The uncertainty created by the split in the circuits, compounded by the potential for forum shopping, will restrict credit by forcing lenders to factor the risk of the lack of protection for ordinary course payments into their credit decisions. Further, because parties are prohibited as a matter of law from prospectively waiving the benefits of the bankruptcy laws, parties cannot negotiate contractual terms to protect lenders from the adverse result of the Ninth Circuit's interpretation of the ordinary course exception.

An irony of the Ninth Circuit's interpretation of the ordinary course exception is that the preference statute is concerned with equality of treatment and distributions among creditors with claims of similar priority. Yet, the effect of the *ZZZZ Best* decision and the split among the four circuits is to discriminate among lenders based solely on the length of the loan term and the jurisdiction of the case, even though the law that governs the dispute in each case is a national bankruptcy law. The inconsistency in the treatment of creditors under a federal law that was clearly intended to be uniformly applied demands prompt resolution by this Court.

II. THE *ZZZZ* BEST DECISION DIRECTLY CONFLICTS WITH DECISIONS OF THREE OTHER CIRCUIT COURTS, WITH THE "PLAIN MEANING" RULE OF STATUTORY CONSTRUCTION, AND WITH THE LEGISLATIVE HISTORY OF THE STATUTE.

A. The Failure to Accord Payments on Long-Term Debt the Protections of § 547(c)(2) Is in Conflict with the Plain Language of the Statute.

The hallmark of § 547(c)(2) is an "ordinariness" standard. There is no language in the statute from which a distinction can be drawn between short-term or trade debt and long-term or other commercial obligations, with only the former being protected from preference recovery. The Ninth Circuit did not suggest that the language of the statute itself supports its interpretation nor did the Ninth Circuit find that the language of the statute is ambiguous. In fact, the court of appeals acknowledged that the "literal" application of the statute would make no distinction whatsoever among loans according to the duration of the loan or the character of the credit so long as the "ordinariness" standard was satisfied.

For the Ninth Circuit to reject the language of the statute and read into the statute a condition not provided by its terms or mandated by the legislative history transgresses the principles of statutory construction articulated by this Court in numerous decisions, including the Court's recent decision in *Ron Pair*. The unambiguous terms of the statute must be deemed "conclusive" according to *Ron Pair* unless this is the "rare case" in which the application of the statute according to its literal terms would create "a result *demonstrably at odds* with the intention of its drafters." (Emphasis added.) *Ron Pair*, 109 S. Ct. at 1031. The scant legislative history that exists for this statute does not support a finding that application of its protections to payments on long-term

debt would violate the intent of Congress; in fact, the legislative history suggests that Congress specifically did not intend to limit the application of the statute to trade debt. Further, Congress did not indicate that any other reservations or restrictions were intended beyond those expressed in the terms of the statute itself.

B. The Scarce Legislative History Does Not Support the Artificial Limitations on the Applicability of the Exception Judicially Created in the *CHG Int'l* and *ZZZZ Best* Decisions.

Section 547(c)(2) was enacted as part of the Bankruptcy Code of 1978.[7] The goals of this exception to the preference rule were clearly identified by Congress:

> The purpose of this exception is to leave undisturbed normal financial relations, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy.

H.R. REP. No. 595, 95th Cong., 1st Sess. 373 (1977), *reprinted in* App. 2 COLLIER ON BANKRUPTCY ch. II (15th ed. 1990); S. REP. No. 989, 95th Cong., 2d Sess. 88 (1978), *reprinted in* App. 3 COLLIER ON BANKRUPTCY ch. V (15th ed. 1990).

The Ninth Circuit conceded that there is little legislative history accompanying the 1984 amendments to the Code that eliminated the 45-day rule. *CHG Int'l*, 897 F.2d at 1484. The Ninth Circuit further acknowledged that *"a literal . . . reading of the new section 547(c)(2) appears to remove the primary obstacle which excluded*

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[7] The statute as originally enacted included the three existing requirements of the ordinary course of business exception and an additional requirement that the payment or transfer in question be made within 45 days of the date the debt was incurred. Congress later eliminated the 45-day requirement as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984.

these [long-term] loans from the exception." [8] (Emphasis added.) *CHG Int'l*, 897 F.2d at 1484.

This Court in its 1988 decision in *United Sav. Ass'n of Texas v. Timbers of Inwood Forest, Ltd.*, 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988), made it abundantly clear that it is improper for a court to impute a significance to a statute from legislative history so as to alter the import of the explicit statutory language. As the Court stated in referring to the legislative history of the statutes at issue in that case, *"Such generalizations* [in the legislative history] *are inadequate to overcome the plain textual indication* in §§ 506 and 362(d)(2) of the [Bankruptcy] Code that Congress did not wish the undersecured creditor to receive interest on his collateral during the term of the stay." (Emphasis added.) *Timbers*, 484 U.S. at 380. Shortly after the *Timbers* decision, this Court reaffirmed the duty of the bankruptcy courts to enforce the Bankruptcy Code as written, prohibiting the courts from using their equitable powers to circumvent the unambiguous language of the provisions of the Code. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S. Ct. 968, 99 L. Ed. 2d 169 (1988) ("whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code").

The sparse legislative history that does exist indicates that Congress certainly intended that the statute protect payments made on obligations other than trade debt. For example, the protection of payments made on commercial paper is addressed in a colloquy between Senators DeConcini and Dole that was relied upon by the Tenth Circuit in reaching the conclusion, contrary to the Ninth Circuit's decision, that debts with a term of up to one

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[8] In effect, based on the change in the statute, any loans or other obligations on which payment is made more than 45 days after the debt is incurred would be long term in this context.

year are protected by the ordinary course of business exception. *New Hope Baptist*, 880 F.2d at 1175-76, *citing* 130 CONG. REC. 20,091 (1984). This part of the legislative history was not addressed by the Ninth Circuit in either *CHG Int'l* or *ZZZZ Best*.

In the face of this limited legislative history and the explicit terms of the statute which include no restrictions on its application to short-term or trade debt, the Court of Appeals for the Sixth Circuit has reasoned that it is bound to enforce the statutory language of § 547(c)(2). In *Finn*, the Sixth Circuit held that there is no basis for excluding payments on long-term debt from the protections of § 547(c)(2) as a matter of law. This ruling directly conflicts with the Ninth Circuit rulings in *CHG Int'l* and *ZZZZ Best* that as a matter of law, such payments are not entitled to protection from recovery under the ordinary course of business exception.

In *Finn*, the Sixth Circuit evaluated the available legislative history surrounding the statute and directly responded to the commentators and courts that have taken the position that § 547(c)(2) applies only to short-term trade debt despite Congress's elimination of the 45-day rule:

> The problem with this analysis is that *it imports too much assumed history into the barren language of the statute.* On its face, the pre-1984 language applied to all debt incurred "in the ordinary course," and the limitation came from requiring the payment within 45 days of the debt. By eliminating the 45-day limitation, and neither stating nor implying any other limitation, Congress's language left the field open to long-term consumer debt for exception under § 547(c)(2). Some courts take the position, as *In re Control Electric*, that without legislative history to back it up, a change in the language of the statute is not to be respected. . . .
>
> We reject this method of statutory interpretation. *The position of the In re Control Electric*

> *court—that transfers made pursuant to long-term debt cannot be excepted from the avoidance provisions of § 547(b)—cannot be derived from the statutory language or legislative history,* [emphasis added] and it is factually inconsistent with American credit practices today. The type of loan taken out by Finn in this case is, indeed, the life blood of credit unions such as hers and of commercial credit companies, and is an important part of the business of banks. Such a transaction can scarcely be "unusual" for *every* borrower [emphasis in original].

Finn, 909 F.2d at 907-08.

The decision of the Ninth Circuit rejecting the plain language of the statute has broad and devastating ramifications for lenders in the face of the Seventh Circuit's ruling in *Deprizio* and its reliance on the ordinary course of business exception to protect lenders from the harsh rule which it established in that case. *Deprizio* subjects a lender holding an insider guaranty to preference liability for payments made *during the entire year* prior to the petition rather than the usual 90-day period. The court in *Deprizio* responded to creditors' concerns that its ruling would substantially increase their exposure to preference liability with the statement that "It is enough to observe that § 547(b)(5) and (c), both before and after amendment, *exclude from recovery the bulk of ordinary commercial payments.*" (Emphasis added.) *Deprizio*, 874 F.2d at 1199. The court cited an example of the application of the ordinary course of business exception and its protection of routine payments on commercial loans as follows:

> A creditor makes an unsecured loan guaranteed by an insider and requires monthly payments *over a number of years.* The trustee seeks to recover all of the payments during the year before the filing. To the extent the debtor paid on time, the creditor is protected by the current version of § 547(c)(2), the "ordinary course" rule. [Emphasis added.]

Deprizio, 874 F.2d at 1200.

The comfort to commercial lenders discussed in *Deprizio* will not be available to lenders in bankruptcy cases that are filed in the states governed by the Ninth Circuit if this Court does not grant this petition and overrule the Ninth Circuit's flawed construction of the "ordinary course of business" exception to the preference rule.

III. THE POLICIES OF THE PREFERENCE LAW AND ITS EXCEPTION FOR ORDINARY COURSE PAYMENTS DO NOT SUPPORT THE NINTH CIRCUIT'S REFUSAL TO APPLY THE EXCEPTION TO LONG-TERM DEBT.

The Ninth Circuit has identified two policies underlying the preference laws: to discourage a "race to the courthouse" and dismemberment of the debtor during the debtor's financial decline, and to equalize the distribution of assets of the estate among similarly situated creditors. In attempting to promote the latter policy, the Ninth Circuit ignored the effect of its decision on the former policy. The Ninth Circuit also erroneously concluded that depletion of the estate is avoided by a rule that protects only payments made on short-term debt and not long-term debt.

A. The Failure to Protect Ordinary Course of Business Payments on Long-Term Debt Creates a Strong Disincentive to Lenders to Work with a Struggling Debtor, Particularly in Light of *Deprizio*.

Although the Ninth Circuit specifically commented on the dual policies of the preference statutes, the court ignored the first policy of discouraging unusual action and pressure by a creditor as a debtor's financial condition declines when it ruled that ordinary payments on long-term debt should not be protected under § 547(c)(2). In light of the *Deprizio* ruling which subjects creditors with insider guaranties to preference liability for a one-year period prior to the bankruptcy, any delay by a creditor in asserting its rights at the first sign of the debtor's financial trouble is only likely to increase

the creditor's potential preference exposure. At the same time, the debtor's assets will be declining as it slides toward bankruptcy. There is no incentive for the creditor to not aggressively pursue repayment of the debt since the ordinary course payments will be recoverable by the estate in any event. The rule established by the court in *CHG Int'l* and *ZZZZ Best* thus defeats one of the two key policies the preference statutes are designed to promote and is inconsistent with the express concern of Congress that "normal financial relations" be left "undisturbed." H.R. REP. No. 595, 95th Cong., 1st Sess. 373-74 (1977), *reprinted in* App. 2 COLLIER ON BANKRUPTCY ch. II (15th ed. 1990); S. REP. No. 989, 95th Cong., 2d Sess. 88 (1978), *reprinted in* App. 3 COLLIER ON BANKRUPTCY ch. V (15th ed. 1990).

B. Avoiding Depletion of the Estate Is Not Accomplished by the Ninth Circuit's Rule.

The estate is equally depleted by payments on short-term and long-term debt made during the preference period. Regardless of when the consideration underlying the preferential payment is transferred to the debtor, the estate is still depleted when the preferential payment is ultimately made to the creditor. Although § 547(c)(2) is designed to encourage creditors to continue to provide a financially troubled debtor with credit, the statute actually only protects the creditor who ultimately is preferred by allowing the creditor to retain the preferential transfer.

By allowing the working capital under Union Bank's line of credit to remain with the debtor in consideration of the receipt of the regular monthly interest payments, Union Bank has done as much or more to "replenish" the estate than the hypothetical "short-term" trade creditor that has supplied goods to the business prior to the petition and been paid in full for the goods supplied. Indeed, Union Bank "replenished" the estate in the sum of $7,000,000 within seven months of the bankruptcy—the trade creditors' contribution to the debtor's estate paled in comparison.

Further, Congress made it clear in the limited legislative history under the 1984 amendments that it intended the elimination of the 45-day rule to protect payments made on commercial paper; yet those payments would clearly deplete the estate just as much as the payments on the working capital line of credit issued by Union Bank to ZZZZ Best in this case. In fact, the role of commercial paper, and the payments made thereon, is virtually identical in all respects to that of the line of credit in this case with the exception, perhaps, of the duration of the credit. Depletion, therefore, could not be the primary policy consideration of Congress in protecting ordinary course of business payments. Even if it were the paramount concern of the statute rather than maintaining normalized credit relations, the Ninth Circuit's rule does not better protect the estate against depletion than the rule of the Sixth Circuit that would encourage creditors to continue to deal with the debtor under their normal loan terms without threat of preference exposure, thereby providing the debtor the benefit of the loan proceeds during its period of financial distress.

IV. IF THE DISTINCTION BETWEEN LONG-TERM AND SHORT-TERM DEBT IS TO BE MADE IN APPLYING § 547(c)(2), THEN A LEGAL STANDARD MUST BE ESTABLISHED AS TO WHAT CONSTITUTES LONG-TERM DEBT, CONSISTENT WITH GENERALLY ACCEPTED ACCOUNTING PRINCIPLES AND BUSINESS PRACTICES.

If the Court concludes that the Ninth Circuit's interpretation of § 547(c)(2) is proper, then it is nevertheless appropriate for the Court to grant this petition to determine what loans will be entitled to the protections of § 547(c)(2) and what loans will be excluded as "long term." The Ninth Circuit has not defined what constitutes "long-term" debt. The debt in *CHG Int'l* had a

term of seven months, and the loan in *ZZZZ Best* had an eight-month term. In reaching its result in *CHG Int'l*, the court relied on an opinion of the Bankruptcy Court for the Western District of Louisiana which held that a 90-day working capital loan whose maturity had been extended from time to time was a long-term debt not protected by § 547(c)(2). *CHG Int'l*, 897 F.2d at 1485, *citing In re RDC Corp.*, 88 Bankr. 97 (Bankr. W.D. La. 1988).[9]

Based on the failure of the Ninth Circuit to set forth any definition of long-term debt and its reliance on a case in which a loan of only 90 days was considered "long-term," lenders have no way of determining what loans may have a risk of preference liability in the event of a future bankruptcy filing and what term will bring the loan payments within the ordinary course of business exception. Further, the court's implicit determination that a loan of seven months or more is "long-term" is inconsistent with generally accepted accounting principles and commercial realities. Accounting standards, accepted by the Internal Revenue Service and implemented in business practice, dictate that obligations with a term of less than one year be deemed short-term, current liabilities. ARB 43; S. Stern, *supra*. The Ninth Circuit has provided no basis for using a definition of long-term debt that is different from that which has been generally accepted in the business and accounting community and which is therefore fairly within the expectation of both debtors and lenders.

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[9] The ruling in *RDC* that a 90-day loan is "long-term" debt is inconsistent with the exchange between Senators DeConcini and Dole in which they confirmed that commercial paper was expressly intended to be protected by the elimination of the 45-day rule. Short-term commercial paper typically has a term of 90 days. *See New Hope Baptist*, 880 F.2d at 1175-76.

CONCLUSION

WHEREFORE, Petitioner Union Bank prays that a writ of certiorari issue from This Honorable Court to review the judgment of the Court of Appeals for the Ninth Circuit in *In re ZZZZ Best Co., Inc (Wolas v. Union Bank)*. In the event that the petition is granted, Petitioner prays that the judgment of the Court of Appeals for the Ninth Circuit be reversed and that the cause be remanded with directions to affirm the judgment of the District Court for the Central District of California.

Respectfully submitted,

JOHN ALBERT GRAHAM
Counsel of Record
LESLEY ANNE FLEETWOOD HAWES
FRANDZEL & SHARE
A Law Corporation
6500 Wilshire Boulevard
Seventeenth Floor
Los Angeles, California 90048-4920
(213) 852-1000

STEPHEN H. WEISS
Senior Vice President and
Deputy General Counsel
Office of the General Counsel
UNION BANK
445 South Figueroa Street
Los Angeles, California 90071-1602
(213) 236-5906

Attorneys for Petitioner,
Union Bank

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 89-55902

IN RE ZZZZ BEST CO., INC.,
a California corporation,
Debtor.

HERBERT WOLAS, Chapter 7 Trustee
for the Estate of ZZZZ Best Co., Inc.,
Plaintiff-Appellant,

v.

UNION BANK,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California

Argued and Submitted Dec. 4, 1990

Decided Dec. 28, 1990

Terry A. Ickowicz and Steven N. Kurtz, Wolas, Soref & Ickowicz, Los Angeles, Cal., for plaintiff-appellant.

John Graham, Frandzel & Share, Los Angeles, Cal., for defendant-appellee.

Before BROWNING, PREGERSON and LEAVY, Circuit Judges.

PER CURIAM:

ZZZZ Best entered into an eight-month revolving credit agreement with Union Bank in December 1986. It made several payments of interest and loan commitment fees

between December 1986 and July 1987, when the company filed for bankruptcy. The trustee, Wolas, tried to recover some of the payments for the benefit of the creditors as preferential transfers avoidable under 11 U.S.C. § 547. The bank defended the payments as being made in the ordinary course of business, and thus protected from recovery under § 547(c)(2). Wolas replied they were not protected because ZZZZ Best had been operating a fraudulent "Ponzi" scheme and so *had* no "ordinary" course of business. The bankruptcy court found for the bank as a matter of law, and the district court affirmed. We reverse on the authority of *In re CHG Int'l, Inc.*, 897 F.2d 1479 (9th Cir.1990), without reaching the "Ponzi" scheme issue.

In *CHG Int'l* we held that interest payments on long-term debt are not covered at all by the ordinary course of business exception. *Id.* at 1482, 1486. Union Bank argues the revolving line of credit in this case is not "long-term" because it is for less than a year; however, one of the two loans at issue in *CHG Int'l* was for only seven months, yet the court considered it long-term.

The bank also argues the revolving line of credit in this case differs from the loan at issue in *CHG Int'l* because it was pre-payable at any time and the debtor's continued access to funds depended on continuing to make interest payments. However, as a pratical matter, a debtor's continuing access to any loan depends on continuing to make interest payments—if payments are discontinued, the debtor is in default and the loan will be called. The debtor became bound when it delivered its promissory note to the bank; the exact amount of interest owed each month is irrelevant. We fail to see any significant difference between a revolving line of credit and an ordinary loan for purposes of § 547(c)(2).

REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 88-6285 KN

Bk. No. 87-13692 GM

Adv. No. 87-02472 GM

IN RE ZZZZ BEST CO., INC.,
a Nevada corporation,
Debtor.

HERBERT WOLAS, Chapter 11 Trustee,
Plaintiff and Appellant,

vs.

UNION BANK,
Defendant and Respondent.

ORDER AFFIRMING JUDGMENT

[Filed Aug. 4, 1989]

On July 31, 1989, the appeal of the Trustee, Herbert Wolas, came on regularly for hearing before the Honorable David V. Kenyon in Courtroom 3 at 9:30 a.m. Terry A. Ickowicz and Steven N. Kurtz of Wolas, Ickowicz & Soref appeared on behalf of appellant Herbert Wolas. John A. Graham of Frandzel & Share, A Law Corporation appeared on behalf of appellee Union Bank. The

Court having considered the briefs, excerpts of record and other matters submitted in connection with this appeal, and having considered the arguments of counsel, the matter having been submitted and the Court having rendered its decision in open court and good cause appearing therefor, it is

ORDERED that the judgment of the United States Bankruptcy Court is hereby *Affirmed.*

Dated: August 4, 1989

/s/ David V. Kenyon
DAVID V. KENYON
United States District Court
Judge

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a resident of the county aforesaid. I am over the age of eighteen years and not a party to the within-entitled action. I am employed by the firm of Frandzel & Share, A Law Corporation, located at 6500 Wilshire Boulevard, Seventeenth Floor, Los Angeles, California, 90048.

On August 1, 1989, I served the within ORDER AFFIRMING JUDGMENT on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Terry A. Ickowicz, Esq.
Steven N. Kurtz, Esq.
WOLAS, ICKOWICZ & SOREF
1840 Century Park East, 11th Floor
Los Angeles, CA 90067

and placing the said envelope for collection and mailing on that date following this firm's ordinary business practices described above.

Executed on August 1, 1989, at Los Angeles, California.

I declare that I am employed in the office of a member of the bar of this Court at whose direction service was made.

/s/ Wilma Ginsburg
WILMA GINSBURG

APPENDIX C

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Bk. No. LA 87-13692-GM

Adv. No. 87-02472-GM

(CHAPTER 11)

IN RE ZZZZ BEST CO., INC., a Nevada corporation,
Debtor.

HERBERT WOLAS, Chapter 11 Trustee,
Plaintiff,
vs.

UNION BANK,
Defendant.

JUDGMENT ON FIRST CAUSE OF ACTION;
ADJUDICATION OF CONTROVERSIES ON
FOURTH CLAIM FOR RELIEF
[PROPOSED]

[Filed Aug. 22, 1988]

Date: Aug. 11, 1988
Time: 9:00 AM
Place: Courtroom "G"

The above-entitled cause having come on regularly for hearing before this Court on motion of defendant Union Bank for summary judgment against plaintiff Herbert

Wolas on the first claim for relief and for an adjudication of controversies on the fourth claim for relief, on June 16, 1988, the Honorable Geraldine Mund, United States Bankruptcy Judge presiding; Dana M. Perlman of Frandzel & Share appearing for Union Bank, and Terry Ickowicz of Wolas, Soref & Ickowicz appearing for plaintiff; and the Court, having reviewed the declarations and documents submitted into evidence, and having read and considered the memoranda of points and authorities submitted by the parties, and having heard and considered oral argument at the hearing, and having issued its findings of fact and conclusions of law:

IT IS ORDERED AND ADJUDGED that plaintiff take nothing on its first claim for relief, that the first claim for relief be dismissed on the merits and that defendant Union Bank recover of the plaintiff Herbert Wolas, Chapter 11 Trustee, its costs of action. A final judgment as to the first claim for relief of the complaint shall be entered forthwith in accordance with Rule 54 (b) of the Federal Rules of Civil Procedure since there is no just reason for delay.

IT IS FURTHER ORDERED that the fourth claim for relief of the complaint is limited to the assignment of collateral pursuant to 11 U.S.C. § 547(c)(5), and that § 547(c)(5) does not apply to the April 10, 1987 payment of a $2,511.38 loan commitment fee, and the $48,951.39 April 30, 1987 and the $52,869.44 June 1, 1987 payments of accrued interest.

IT IS FURTHER ORDERED that the judgment entered on July 14, 1988 is vacated.

Dated: 8/22/88

/s/ Geraldine Mund
GERALDINE MUND
United States Bankruptcy Judge

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and employed in the county aforesaid. I am over the age of eighteen years and not a party to the within-entitled action. I am employed by the firm of Frandzel & Share, A Law Corporation, located at 6500 Wilshire Boulevard, Seventeenth Floor, Los Angeles, California, 90048.

I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service, and, following ordinary business practices, the correspondence is sealed and placed for collection and mailing with the United States Postal Service in Los Angeles, California, that same date.

On August 11, 1988, I served the within JUDGMENT RE FIRST CAUSE OF ACTION; ADJUDICATION OF CONTROVERSIES ON FOURTH CLAIM FOR RELIEF [PROPOSED] on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

1) Terry Ickowicz, Esq., WOLAS SOREF and ICKOWICZ, 1840 Century Park East, 11th Floor, Los Angeles, CA 90067;

2) Davis von Wittenburg, U.S. Trustee, 3101 Federal Building, 300 North Los Angeles Street, Los Angeles, CA 90012

and placing the said envelope for collection and mailing on that date following this firm's ordinary business practices described above.

Executed on August 11, 1988, at Los Angeles, California.

I declare that I am employed in the office of a member of the bar of this Court at whose direction service was made.

/s/ Beatrice Babacci
BEATRICE BABACCI

APPENDIX D

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Bk. No. LA 87-13692-GM

Adv. No. 87-02472-GM

(CHAPTER 11)

IN RE ZZZZ BEST CO., INC., a Nevada corporation,
Debtor.

HERBERT WOLAS, Chapter 11 Trustee,
Plaintiff,
vs.

UNION BANK,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
[PROPOSED]

[Filed Aug. 22, 1988]

Date: August 11, 1988
Time: 9:00 a.m.
Place: Courtroom "G"

The above-referenced adversary proceeding came on regularly for hearing on defendant's motion for summary judgment on the first claim for relief of the complaint and for an adjudication that the fourth claim for relief is limited in scope to apply only to the assignment of collateral and on the plaintiff's cross-motion for summary judgment on June 16, 1988 at 9:00 a.m. in Courtroom "G" of the above-entitled court, the Honorable Geraldine Mund, Bankruptcy Judge presiding. Terry A. Ickowicz of Wolas, Soref & Ickowicz appeared on behalf of plaintiff Herbert Wolas, Chapter 11 Trustee. Peter Csato and Dana M. Perlman of Frandzel & Share, A Law Corporation, appeared on behalf of defendant Union Bank. The court having reviewed the Notice of Motion and Motion for Summary Judgment and for an Adjudication of Controversies on Fourth Claim for Relief, Declaration of Susan Russel in Support of Union Bank's Motion for Summary Judgment and for Adjudication of Controversies on Fourth Claim for Relief, Union Bank's Memorandum of Points and Authorities in Support of Motion for Summary Judgment and for Adjudication of Controversies on Fourth Claim for Relief, Declarations of Terry A. Ickowicz, Herbert Wolas and Donald R. Wanger, Reply and Cross-Motion for Summary Judgment and Memorandum of Points and Authorities in Support Thereof, Union Bank's Memorandum of Points and Authorities: 1. Opposition to Trustee's Cross-Motion for Summary Judgment; 2. Reply to Trustee's Response to Union Bank's Motion for Summary Judgment, Union Bank's Evidentiary Objections to the Declarations of Terry A. Ickowicz, Herbert Wolas and Donald R. Wagner, Union Bank's Supplemental Evidentiary Objections to the Declaration of Terry A. Ickowicz, and Response to Union Bank's Evidentiary Objections to the Declarations of Terry A. Ickowicz, Herbert Wolas and Donald R. Wagner, all on file in this matter and having heard the arguments and contentions of counsel, finds and concludes as follows:

FINDINGS OF FACT

1. On December 16, 1986, debtor ZZZZ Best Co., Inc. ("ZZZZ Best") and defendant Union Bank (the "Bank") entered into a revolving credit agreement ("Credit Agreement"), pursuant to which the Bank agreed to lend ZZZZ Best the sum of $7,000,000 in accordance with the terms of a promissory note to be executed and delivered by ZZZZ Best. In accordance with the custom and practice of the Bank and the custom in the commercial lending industry, the Credit Agreement provides, *inter alia*, that ZZZZ Best shall pay, on a monthly basis, a loan commitment fee of .50% per year on the average daily unused portion of the loan for the preceding month.

2. On December 17, 1987, ZZZZ Best executed and delivered to the Bank its promissory note ("Note") in the principal sum of $7,000,000. The Note provides that interest is to accrue on the principal balance at the rate of .65% per annum in excess of the Bank's reference rate and that interest shall be payable on a monthly basis.

3. In accordance with the Bank's ordinary commercial lending procedure and practice, ZZZZ Best executed on that same date an authorization for disbursement ("Authorization for Disbursement") which authorized the Bank to charge ZZZZ Best account no. 10057-9853 ("ZZZZ Best Account") for all payments due under the Note.

4. Throughout the course of the relationship between the Bank and ZZZZ Best, the Bank was a lender, providing credit to ZZZZ Best, to be used for its general working capital, at a market rate of interest. The Bank acted as a commercial lender operating under normal credit terms. The Bank did not act as an investor and had no interest or participation in ZZZZ Best's potential profits. The Bank expected to receive only the normal market interest rate on the credit which it extended to ZZZZ Best.

5. On February 2, 1987 the principal balance on the loan was paid down to $5,000,000. On February 9, 1987, the loan balance increased to $6,000,000. On February 10, 1987, the loan balance increased to $7,000,000. Pursuant to the terms of the Credit Agreement, the loan commitment fee for February, 1987 was $2,511.38.

6. Pursuant to the terms of the Credit Agreement, the Note, and the Authorization for Disbursement, the following payments were automatically deducted by the Bank from the ZZZZ Best account:

Date	Amount	Nature of Payment
December 31, 1986	$22,186.11	December 1986 Interest
February 2, 1987	$49,126.39	January 1987 Interest
March 2, 1987	$41,881.93	February 1987 Interest
March 31, 1987	$49,126.38	March 1987 Interest
April 10, 1987	$ 2,511.38	March 1987 Loan Commitment Fee
April 30, 1987	$48,951.39	April 1987 Interest
June 1, 1987	$52,869.44	May 1987 Interest

7. On July 8, 1987, ZZZZ Best filed its voluntary petition under Chapter 7 of Title 11 of the United States Code.

8. There was an ongoing business relationship between ZZZZ Best and the Bank prior to the 90 days preceding ZZZZ Best's bankruptcy.

9. At the time that the Bank and ZZZZ Best entered into the Credit Agreement, the Bank had no knowledge of any fraud allegedly perpetrated by ZZZZ Best.

CONCLUSIONS OF LAW

1. This adversary proceeding is a "core proceeding" within the meaning of 28 U.S.C. § 157.

2. Section 547(c)(2) of Chapter 11, Title 11, United States Code, provides for the exception of "ordinary course of business" transfers from the trustee's avoidance powers and this exception is not limited to just payments to "trade creditors."

3. ZZZZ Best's debt obligation to the Bank as set forth in the Note was incurred by ZZZZ Best in the ordinary course of business or financial affairs of both ZZZZ Best and the Bank. 11 U.S.C. § 547(c)(2)(A).

4. The April 10, 1987 payment of the $2,511.38 loan commitment fee by ZZZZ Best was a bargained-for element of the parties' normal financial relations and was made in the ordinary course of business or financial affairs of both ZZZZ Best and the Bank. 11 U.S.C. § 547(c)(2)(B).

5. Both the April 30, 1987 interest payment of $48,951.39 and the June 1, 1987 interest payment of $52,869.44 by ZZZZ Best were bargained-for elements of the parties' normal financial relations and were made in the ordinary course of business or financial affairs of both ZZZZ Best and the Bank. 11 U.S.C. § 547(c)(2)(B).

6. The payments of the April 10, 1987 loan commitment fee, the April 30, 1987 interest and the June 1, 1987 interest were made according to ordinary business terms and in accordance with the Bank's usual custom and practice and the terms of the Note, the Authorization for Disbursement and the Credit Agreement. 11 U.S.C. § 547(c)(2)(C).

7. The congressional intent behind 11 U.S.C. § 547(c)(2), to protect "ordinary course of business" transfers from the trustee's avoidance powers does not limit the scope of such protection only to payments to "trade creditors."

8. The congressional policy behind 11 U.S.C. § 547(c)(2) mandates the insulation of ordinary and regular payments of interest and loan commitment fees from the trustee's avoidance powers. *See, In re Smith-Douglass, Inc.*, 17 B.C.D. 769, 770 (4th Cir. 1988).

9. For the purpose of examining plaintiff's cross-motion, the Court considered the alleged facts that ZZZZ Best engaged in fraudulent business activities. Even if ZZZZ Best engaged in fraudulent business activities, ZZZZ Best's payments of interest and loan commitment fees to the Bank are excepted from the trustee's avoidance powers because the Bank was not involved in such alleged fraudulent activities and acted merely as a commercial bank lender to ZZZZ Best, and further, Union Bank was not an investor in the ZZZZ Best business.

10. The policy enunciated in the Ponzi scheme line of cases set forth below—that required equality of distribution among a defrauded class of similarly situated investors—is not applicable to this case. The Bank received the payments as a commercial lender involved in a routine loan transaction and was not an investor and had no claim to any extraordinary profits such as is the usual case in a Ponzi type scheme. *See, In Re Bishop, Baldwin, Rewald, Dillingham and Wong*, 819 F.2d 214, 217 (9th Cir. 1987); *In Re Bullion Reserve of North America*, 836 F.2d 1219 (9th Cir. 1988); *In Re Western World Funding, Inc.*, 54 Bankr. 470, 481, (Bankr. D. Nev. 1985); *In Re Independent Clearing House Co.*, 41 Bankr. 985, 1014 (Bankr. Utah 1984).

11. Judgment on the first claim for relief of the complaint should be granted in favor of defendant on the basis that the payments of interest and the loan commitment fee which plaintiff seeks to avoid as preferential payments are excepted from the trustee's avoidance powers as payments in the "ordinary course of business" pursuant to 11 U.S.C. § 547(c)(2).

12. The request to limit the scope of the fourth claim for relief of the complaint should be granted on the grounds that the Bank's improvement in condition should be limited to the assignment of collateral pursuant to 11 U.S.C. § 547(c)(5). The trustee's avoidance power under § 547(c)(5) does not apply to the April 10, 1987 payment of a $2,511.38 loan commitment fee, and the

$48,951.39 April 30, 1987 and the $52,869.44 June 1, 1987 payments of accrued interest.

13. Plaintiff's cross-motion for summary judgment should be denied in its entirety.

14. A final judgment as to the first claim for relief of the Complaint shall be entered in accordance with Rule 54(b) of the Federal Rules of Civil Procedure, since there is no just reason for delay in doing so.

All findings of fact which are additionally or alternatively conclusions of law are deemed conclusions of law; all conclusions of law which are additionally or alternatively findings of fact are deemed findings of fact.

Dated: 8/22/88

/s/ Geraldine Mund
GERALDINE MUND
United States Bankruptcy Judge

PRESENTED BY:

FRANDZEL & SHARE
A Law Corporation
JOHN A. GRAHAM
PETER CSATO
DANA M. PERLMAN

By: /s/ Dana M. Perlman
DANA M. PERLMAN
Attorneys for Defendant
UNION BANK